

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ALLEN LEE MAY,

Defendant-Appellant.

UNPUBLISHED

March 23, 2006

No. 258238

Ingham Circuit Court

LC No. 03-000101-FH

Before: Smolenski, P.J., Whitbeck, C.J., and O'Connell, J.

PER CURIAM.

Defendant Allen May appeals as of right from his jury trial conviction of operating a motor vehicle while having an unauthorized blood alcohol level (OUIL/UBAL), third offense.¹ On January 9, 2003, while he was attempting to exit a freeway, May's vehicle struck a curb and rolled over down an embankment. A Breathalyzer test showed May to have a blood alcohol level of 0.20 grams per 100 milliliters. The trial court sentenced May, as a third offense habitual offender,² to 18 to 120 months' imprisonment. We affirm.

I. Basic Facts And Procedural History

Gordon Frederick testified that on the morning of January 9, 2003, he was driving on I-96 and saw a pick-up truck approach his vehicle from behind at a high rate of speed. Frederick testified that the driver of the truck attempted to exit the freeway but was traveling too fast. The truck struck the curb, flipped, and rolled over down the embankment.

Lansing Police Department Officer Vicki Dahlke was first to arrive at the scene. Officer Dahlke testified that May told her that he tried to make the exit but that his vehicle malfunctioned. May told her that he was not injured, except his shoulder hurt. Officer Dahlke testified that she smelled alcohol on May's breath and noted that May was slow to respond to her questions, spoke very slowly, and was unsteady on his feet. According to Officer Dahlke, May stated that he had not been drinking, but she did not believe him. Officer Dahlke asked May to perform some field sobriety tests, which May failed. Lansing Police Officer Matt Krumbach arrived later at the scene, smelled alcohol on May, and noticed that May's speech was slurred. Officer Dahlke arrested May and transported him to the police station.

¹ MCL 257.625(1)(b), (8)(c).

² MCL 769.11.

Officer Krumbach, a certified Breathalyzer operator, testified that he gave May a Breathalyzer test at the police station following May's arrest. Officer Krumbach described the booking area at the police station as a cement walled area with a mesh cage and a table. He explained that there were benches along the side and three doors, one of which led into the Breathalyzer room. Before administering the Breathalyzer test, Officer Krumbach, as required, observed May for 15 minutes in the Breathalyzer room to ensure that he did not place any foreign objects in his mouth or regurgitate anything before the officer administered the test. Officer Krumbach testified that he did not see May burp, throw up, or do anything that would alter the test. A Breathalyzer evidence ticket admitted into evidence indicated that Officer Krumbach started to observe May at 11:55 a.m. Officer Krumbach said that he monitored the Breathalyzer clock to determine when 15 minutes had passed. He said that after the 15-minute observation period had passed, he placed the Breathalyzer ticket into the machine and starting typing May's identifying information on the ticket. Officer Krumbach testified that, almost 30 minutes after the observation period had begun, May took one Breathalyzer test at 12:25 p.m. and another at 12:27 p.m., as indicated by the Breathalyzer evidence ticket. The results of both of May's tests were a blood alcohol level of 0.20 grams per 100 milliliters.

Two videotapes from the police station were introduced. Officer Krumbach testified that he was one of the officers that appeared in the first video. Officer Krumbach stated that the officer in the video apparently taking property from May was Officer Dahlke. The time on the video camera clock read 11:47 a.m., which is when Officer Krumbach said he entered the Breathalyzer room. From 11:48 a.m. to 11:49 a.m., Officer Krumbach walked out of the Breathalyzer room, washed his hands in a sink, and walked back into the room. Officer Krumbach stated that he relied on Officer Dahlke to observe May while he was away. Officer Krumbach admitted that at 11:55 a.m., as indicated by the video camera time, May was still in view of the camera "outside next to the cage." On cross-examination, Officer Krumbach testified that at 11:58 a.m., video camera time, he and May walked out of sight from the video as Officer Krumbach escorted May to the bathroom. However, on re-direct, Officer Krumbach stated that at 11:56 a.m. video camera time he asked May if he needed to use the bathroom, and at 11:58 a.m. video camera time he was again in view of the camera. The second videotape showed Officer Krumbach taking May to use the restroom, which is located in a holding cell area. Officer Krumbach stated that he monitored May during that time.

According to the time displayed on the first video, at 12:03 p.m. Officer Krumbach escorted May to the Breathalyzer room. There was no video camera in the Breathalyzer room. Officer Krumbach testified that 12:03 p.m. video camera time was when he started his "protocol for [the] observation" period. Officer Krumbach admitted that at 12:07 p.m., video camera time, he walked out of the Breathalyzer room and did not restart the 15-minute period because he was still able to view May. At 12:18 p.m. video camera time, May walked out of the Breathalyzer room and sat on a bench. The videotape showed May still sitting on a bench inside a corridor until 12:26 p.m. Officer Krumbach admitted that May was sitting on a bench in full view of the camera during the times that the test was purportedly administered according to the Breathalyzer evidence ticket, but he testified that the internal clock on the Breathalyzer machine and the clock on the video camera were not synchronized.

May had initially pleaded guilty to OUIL, third offense and as a second offense habitual offender.³ However, May later withdrew his plea, stating that he would soon move to suppress his Breathalyzer test based on some alleged irregularities.

At the hearing on May's motion to suppress, May's counsel argued that May could not have taken the two Breathalyzer tests at the times indicated on the Breathalyzer evidence ticket because he was in full view of the camera during those times. The trial court denied May's motion to suppress, stating that the time difference between the video camera and the Breathalyzer machine did not make the tests unreliable or inaccurate. The trial court reasoned that the purpose of the observation period was to prevent a person from doing anything to alter the results of their test, and May did not allege that the test was otherwise unreliable.

After the prosecution rested, May moved for a directed verdict. Defense counsel argued that Officer Krumbach must have taken the Breathalyzer tests at either 12:15 p.m. or 12:16 p.m. to 12:18 p.m. video camera time after entering the Breathalyzer room at 12:03 p.m. video camera time. Referring to Officer Krumbach's absence from the Breathalyzer room at 12:07 p.m., defense counsel asserted that Officer Krumbach's back was to defendant for "a matter of seconds." Defense counsel argued that this was a violation and, because the prosecution proceeded under the UBAL theory, the case had to be dismissed. The trial court denied May's motion.

May testified that he was experiencing problems with his truck before the date of the accident. He said that he had not consumed any alcohol the night before or the morning of the accident. May admitted that he was in the Breathalyzer room for 15 minutes sitting in a chair. But he said that he did not blow into a machine during that time. He said that he later left the room and sat on a bench. When asked what happened after that, May replied, "after I sat on the bench, um it said 12:27. They took me back in the holding cell." He said that after a couple hours had passed, he then blew into something for the first time that day.

The jury convicted May of operating a motor vehicle while having an unauthorized blood alcohol level, third offense. At sentencing, the prosecution stated that the sentencing guidelines provided for 7 to 34 months imprisonment, but she thought 30 to 120 months was appropriate and proportional. When the trial court asked whether the guidelines allowed for a sentence of 30 to 120 months even though the guidelines were scored at 7 to 34 months, the prosecution answered, "Yes." Following further discussion, the trial court noted that, while on bond for this case, May pleaded guilty to a second offense of OUIL third. The trial court then stated that "when you get three OUIL thirds we have to escalate the punishment; otherwise, what kind of a message are we sending?" The trial court initially sentenced May to 18 to 60 months' imprisonment. However, the prosecution clarified that the maximum should be "120 months because of the habitual offender." Defense counsel confirmed that 120 months was "correct." Therefore, the trial court stated, "[o]kay, 120 months," and instead sentenced May to 18 to 120 months' imprisonment.

Following sentencing, defense counsel filed a renewed motion for directed verdict. Defense counsel argued that the Breathalyzer test results should have been suppressed because

³ MCL 769.10.

Officer Krumbach failed to continually observe May for the full 15 minutes. He stated that Officer Krumbach admitted to leaving the room where May was located and admitted that he relied on Officer Dahlke to observe May during the time he was away. Defense counsel reasoned that this was not a technical violation. Defense counsel also argued that, *People v Wujkowski*,⁴ the case relied on by the prosecution at trial to oppose May's motion for directed verdict, was factually dissimilar to May's case. The prosecution replied that *Wujkowski* emphasized that the purpose of the 15-minute observation rule was to prevent a defendant from regurgitating, and there was no allegation that that occurred in this case. The trial court denied May's renewed motion. This appeal followed.

II. Directed Verdict

A. Standard Of Review

May argues that the trial court erred in denying his motion for a directed verdict. Specifically, he argues that because the officer who administered the Breathalyzer test failed to comply with 2003 AACRS, R 325.2655(1)(e), the test results were inadmissible and, thus, the motion for directed verdict should have been granted. We review for clear error a trial court's factual findings in a suppression hearing.⁵ But we review de novo both a trial court's ultimate decision on a motion to suppress⁶ and on a motion for a directed verdict.⁷

B. Admissibility Of Breathalyzer Test

Chemical test results are admissible if the results are both relevant and reliable.⁸ The purpose of the rules regarding administering the tests is to ensure the accuracy of the tests.⁹ Thus, a trial court is required to suppress test results "when there is a deviation from the administrative rules that calls into question the accuracy of the test."¹⁰ Rule 325.2655(1)(e) provides as follows:

A person may be administered a breath alcohol analysis on an evidential breath alcohol test instrument only after being observed for 15 minutes by the operator before collection of the breath sample, during which period the person shall not have smoked, regurgitated, or placed anything in his or her mouth, except for the mouthpiece associated with the performance of the test.

⁴ *People v Wujkowski*, 230 Mich App 181; 583 NW2d 257 (1998).

⁵ *People v Jenkins*, 472 Mich 26, 31; 691 NW2d 759 (2005).

⁶ *People v Sobczak-Obetts*, 463 Mich 687, 694; 625 NW2d 764 (2001); *People v Bolduc*, 263 Mich App 430, 436; 688 NW2d 316 (2004).

⁷ *People v Aldrich*, 246 Mich App 101, 122; 631 NW2d 67 (2001).

⁸ *People v Fosnaugh*, 248 Mich App 444, 450; 639 NW2d 587 (2001).

⁹ *People v Tipolt*, 198 Mich App 44, 46; 497 NW2d 198 (1993).

¹⁰ *Fosnaugh*, *supra* at 450; *Wujkowski*, *supra* at 187.

While test results have previously been suppressed due to a violation of this administrative rule,¹¹ this Court has refused to create a “bright-line rule of automatic suppression of evidence where an administrative rule has been violated.”¹²

In *People v Boughner*, a videotape showed that the Breathalyzer operator was not present until eight minutes before the Breathalyzer test was administered and that he did not observe the defendant continually during that time.¹³ Further, approximately five minutes before the test, the view of the defendant was obstructed for a brief period.¹⁴ Also, throughout the 35 minutes that the defendant was being taped before the test was administered, his hand was near or in his mouth.¹⁵ The videotape failed to establish whether the defendant put anything else in his mouth during the observation period.¹⁶ As a result, this Court held that the 15-minute rule had been violated.¹⁷ Accordingly, this Court vacated the defendant’s conviction.¹⁸

However, a mere technical violation of the rule does not always require the test results to be suppressed.¹⁹ In *Wujkowski*, the Breathalyzer operator continually observed the defendant for the required 15-minute period, except for six seconds when the operator checked to see if 15 minutes had passed.²⁰ Another officer was with the defendant during the officer’s brief absence.²¹ This Court noted that there was no allegation that the defendant regurgitated or placed anything in his mouth and, thus, concluded that there was no showing that the test was inaccurate.²² This Court therefore held that, when viewed under the totality of the circumstances, the violation was harmless and did not require suppression of the test results.²³

In this case, Officer Krumbach’s view of May was not obstructed for any length of time during the observation period. Although May finds it significant that Officer Krumbach left May while he washed his hands and relied on Officer Dahlke to monitor May, according to the video footage, that brief absence—approximately one minute—occurred before the 15-minute observation period commenced.²⁴ And even if it could be said that the observation clock was

¹¹ See, e.g., *People v Boughner*, 209 Mich App 397; 531 NW2d 746 (1995).

¹² *Wujkowski*, *supra* at 187.

¹³ *Boughner*, *supra* at 399.

¹⁴ *Id.* at 399-400.

¹⁵ *Id.* at 400.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Wujkowski*, *supra* at 188.

²⁰ *Id.* at 185.

²¹ *Id.* at 185-186.

²² *Id.* at 186, 187.

²³ *Id.* at 186, 187.

²⁴ The video showed Officer Krumbach leaving to wash his hands at approximately 11:48 a.m. The official observation period, as indicted by the video, did not begin until 12:03 p.m.

running at that time, *Wujkowski* supports a conclusion that the operator's brief absence is excusable if there is another officer present to monitor the defendant.²⁵ Again, the purpose of the administrative rule is to ensure the accuracy of the test, and there is no indication or allegation that May put anything in his mouth or regurgitated at any point.

Officer Krumbach started the 15-minute observation period at 12:03 p.m. video camera time. And although he admitted that, at 12:07 p.m. video camera time, he walked out of the Breathalyzer room, he explained that he did not restart the 15-minute period because he was still able to view May. Thus, the 15-minute protocol was not violated. Accordingly, we conclude that the trial court did not err in denying the directed verdict motion.

Because the trial court did not err in admitting the Breathalyzer test results showing a blood alcohol level of 0.20 grams per 100 milliliters, and because May was driving the vehicle that rolled over while trying to exit the freeway, the prosecution met its burden of proving beyond a reasonable doubt the essential elements of the crime.²⁶

III. Sentencing

May argues that the trial court was under the misapprehension that it had no discretion but to impose a maximum sentence of 120 months' imprisonment. In other words, May argues that the trial court was unaware that it had discretion to impose a maximum sentence less than 120 months. However, May waived appellate review of this issue by affirmatively stating that the maximum sentence imposed (120 months) was accurate.²⁷ In any event, the trial court's comments at sentencing clearly expressed its intent that May be imprisoned for the maximum allowable by law. Thus, we cannot conclude that the trial court was operating under a misapprehension of its discretion when imposing sentence.²⁸

We affirm.

/s/ Michael R. Smolenski
/s/ William C. Whitbeck
/s/ Peter D. O'Connell

²⁵ May also finds it significant that Officer Dahlke did not corroborate Officer Krumbach's testimony, noting that she testified that she had no further contact with May after she turned him over to Officer Krumbach at the police station. However, on a motion for a directed verdict, the evidence must be viewed in a light most favorable to the prosecution. *People v Riley*, 468 Mich 135, 139; 659 NW2d 611 (2003).

²⁶ See *People v Jolly*, 442 Mich 458, 465; 502 NW2d 177 (1993).

²⁷ *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000).

²⁸ See *People v Alexander*, 234 Mich App 665, 675; 599 NW2d 749 (1999); *People v Green*, 205 Mich App 342, 346; 517 NW2d 782 (1994).